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IN THE

Supreme Court of the United States

October Term, 1966

No. 634

MINISTERS LIFE AND CASUALTY UNION,
Appellant,

vs.

ROBERT D. HAASE,
Commissioner of Insurance,

and

BRONSON C. LA FOLLETTE,
Attorney General of the State of Wisconsin,
Appellees.

On Petition for Rehearing of Order Dismissing Appeal from the Supreme Court of the State of Wisconsin

BRIEF FOR THE CHURCH INSURANCE COMPANY AND THE CATHOLIC RELIEF INSURANCE COMPANY OF AMERICA AS *AMICI CURIAE*

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The Interest of the *Amici Curiae*

The Church Insurance Company and The Catholic Relief Insurance Company of America, with the consent of both parties, submit this brief as *amici curiae* in support of the appellant, Ministers Life and Casualty Union.

The Wisconsin Supreme Court judgment appealed from upholds the validity of a Wisconsin statute which asserts

power to regulate and tax insurance contracts with Wisconsin residents, made outside Wisconsin through use of the mails by insurers not licensed in Wisconsin and having no offices or agents therein.

The Church Insurance Company and The Catholic Relief Insurance Company of America conduct their businesses principally by mail without the use of agents, thus effecting substantial savings in costs and premiums. The Church Insurance Company is a nonprofit New York insurance corporation owned by The Church Pension Fund, the pension system for the clergy of the Protestant Episcopal Church. Since its incorporation in 1929 it has been engaged in insuring churches and other property in the Protestant Episcopal Church and affiliated organizations against fire and allied hazards. Its home office is in New York and it is regulated under the New York Insurance Law.

The Catholic Relief Insurance Company of America is a nonprofit Nebraska insurance corporation engaged in insuring properties of the Roman Catholic Church. Its home office is in Omaha, and it is regulated under the Nebraska Insurance Law. It is owned by The Catholic Mutual Relief Society of America, a religious and benevolent society organized in 1889 by members of the American Roman Catholic hierarchy and incorporated under the laws of Nebraska in 1896 for the purpose of providing relief for properties of the Roman Catholic Church in the event of disaster, calamity or need.

The Church Insurance Company insures church properties in 27 states in which it is not licensed. In 1965 its premium income from these 27 states ranged from $37,239.98 from Missouri down to $3.20 from Alaska. The Catholic Relief Insurance Company of America insures church properties in 36 states in which it is not licensed. In 1965 its premium income from these 36 states ranged from $42,037.29 from Montana down to $11.06 from Ver-

mont. The Wisconsin decision here appealed from would subject these companies to regulation and taxation in these states. As was pointed out in the brief submitted to this Court on behalf of these companies as *amici curiae* in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), because of the limited number of church properties in these states and the consequent limits on any increase in the volume of insurance, the practical effect of subjecting these companies to the jurisdiction of the states in which they are not licensed would be to prevent the companies for the foreseeable future, in most if not all of those states, from writing insurance on church properties located there, to the detriment of the dioceses, parishes and religious orders in those states.

ARGUMENT

The Judgment Appealed from Presents a Substantial Federal Question

The McCarran-Ferguson Act of 1945* granted to the states power to regulate and tax the business of insurance, a power the states had been traditionally thought to possess prior to the decision in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944). This grant was confined by Congress, however, within the jurisdictional limitations which had previously been set out by earlier constitutional decisions of this Court. This Court so held in *State Board of Insurance* v. *Todd Shipyards Corp., supra.*

Those earlier decisions were *Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897), *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U.S. 346 (1922), and *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U.S. 77 (1938). They were based on the principle that a state had no jurisdiction to regulate or tax insurance contracts made outside the state by its

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* 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-1015 (1964).

residents. It was that principle which Congress in effect incorporated in the McCarran-Ferguson Act as a statutory limitation on the states' power to regulate and tax the business of insurance. *State Board of Insurance* v. *Todd Shipyards Corp., supra* at 455-56.

Under that principle, use of the mails did not give a basis for jurisdiction. Thus in *Allgeyer* v. *Louisiana, supra,* the Court said (165 U.S. 578, at 592-93):

> "The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. *Milliken* v. *Pratt,* 125 Mass. 374; *Tilden* v. *Blair,* 21 Wall. 241. The contract in this case was thus made.
>
> * * * * *
>
> "Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

In reliance on the principle of those cases, many small insurance companies have traditionally conducted business by mail with residents of other states, economically and without the use of agents or the expense of agents' commissions or of multi-state licensing or taxation. In *Todd* the Court made explicit mention of the severe impact that a change in the old rule would have on such companies.*

The judgment of the Wisconsin Supreme Court appealed from presents a substantial Federal question, namely, whether the Wisconsin statute there sustained exceeds the

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* 370 U.S. 451, at 457.

power granted to the states by Congress in the McCarran-Ferguson Act as construed in *Todd*. It is submitted that it does, and that the Court should hear this appeal.

Conclusion

Probable jurisdiction should be noted, and the judgment below from which this appeal is taken should be reversed.

Respectfully submitted,

CLOYD LAPORTE,
Attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as amici curiae.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
Of Counsel.

December 21, 1966.

CERTIFICATE OF SERVICE

I, CLOYD LAPORTE, attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as *amici curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1966, I served copies of the foregoing Brief for the said *amici curiae*, pursuant to Rule 33 of the Rules of the Supreme Court, by causing copies thereof to be deposited in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record for the appellant at Langdell Hall, Cambridge, Massachusetts 02138, and with airmail postage prepaid, addressed to counsel of record for the appellees at Room 114 East, State Capitol, Madison, Wisconsin 53702.

Cloyd Laporte

CLOYD LAPORTE,

Attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as amici curiae.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A REHEARING

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A REHEARING

The brief of the State of California, as amica curiae, was filed without any notice to the appellant, and without any opportunity for a reply. Moreover, it was felt, obviously mistakenly, that the brief emphasized both the importance and the substantiality of the questions involved. In this situation the appellant feels that it should present this further and fuller argument for the consideration of the Court.[1]

[1] Since the Appellant's Jurisdictional Statement and Reply Brief were filed a comprehensive study of the history, background, and problems in this area has been published, demonstrating the widespread interest in, and importance of the questions here raised. Hanson and Obenberger, "Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business," 50 Marquette L. Rev. 175-345 (1966).

I

CONGRESS, THOUGH WELL INFORMED, HAS REPEATEDLY REFRAINED FROM AMENDING THE STATUTE.

For many years, both before and after the enactment of the McCarran-Ferguson Act in 1945, Congress has been asked to enact special legislation, clearly within its powers, which would have restricted the business of mail order insurance. Congress has never enacted such a statute.

For a number of years, these bills — well-known to persons involved in the insurance business or in insurance regulation — were known as the Hobbs bills, since they were introduced into the House of Representatives by Congressman Hobbs of Alabama. The first such bill that we have been able to find is H.R. 6452, 74th Congress, 1st Session — "Making it unlawful to use the mails to solicit or effect insurance or collect and transmit insurance premiums in any state without complying with the insurance laws thereof." This Bill was introduced by Congressman Hobbs on March 6, 1935, and was referred to the Committee on Post Office and Post Roads. 79 Cong. Rec. 3066.

On May 24, 1935, Congressman Hobbs introduced another Bill, H.R. 8206 — "Making it unlawful for any person, firm, association or corporation not expressly excepted from the operation of the act by the provisions thereof, to use the mails to solicit or effect insurance or collect or transmit insurance premiums in any state without complying with the insurance laws thereof." This, too, was referred to the Committee on Post Office and Post Roads. 79 Cong. Rec. 8213.

Neither Bill was ever reported out of Committee.

Similar Bills were introduced in following years.

In 1943, Congressman Hobbs introduced H.R. 687, 78th Congress, 1st Session—"Making it unlawful to use the mails to solicit or effect insurance or collect and transmit insur-

ance premiums in any state without complying with the insurance laws thereof." This Bill, too, was referred to the Committee on Post Office and Post Roads. Hearings were held on this Bill on April 12 and 13, 1943, which were printed. Early in the Hearings Congressman Hobbs himself testified with respect to the Bills which he introduced in 1935. Hearings, p. 4. He stated that Hearings were held "over 5 days in March and April 1935." He then went on to say (Hearings, p. 4):

> MR. HOBBS. After extensive hearings the opposition created enough doubt as to the wisdom of enacting the bill, to cause the committee to direct me to introduce alternative bills, one providing for Federal regulation in a very mild form, the other the original bill as amended; and I am perfectly willing to amend this bill in any way you gentlemen may see fit. Of course, I prepared and introduced the two bills, but neither was approved by the subcommittee or the full committee, although most of the members of the committee were in sympathy with the objective. On April 19, 1935, the subcommittee under the leadership of Mr. Ashbrook unanimously recommended that H.R. 6452, then under consideration, be not favorably reported, and that ended the matter.

Numerous witnesses testified against the bill in 1943. They represented, among others, the National Mutual Church Insurance Company, Chicago, Illinois, the Associated Factory Mutual Fire Insurance Companies, the Ministers Life and Casualty Union, the Church Pension Fund, the Church Life Insurance Corporation, the Church Properties Fire Insurance Corporation, and the Teachers Insurance and Annuity Association of America. One of the witnesses, representing two of these companies, was former Congressman Oscar Youngdahl, of Minnesota. His testimony included the following (Hearings, pages 38, 39):

> I believe these companies have a very definite place in the insurance field, because they are serving a class of people who cannot spend much money for insurance premiums. If we eliminate them, we will deprive many people in America of that type of beneficial service.

Other legitimate companies could not perform a similar service because they will be affected in the same way if this legislation passes. There are many other companies who operate in the same manner and are performing a splendid service. (P. 38.)

* * * * *

So far as this proposed legislation is concerned, I am wondering whether our present law and the cooperation between the commissioners of insurance of the various States is not sufficient and would not obtain the same results, and it would be better to follow it rather than to pass legislation that might exclude a legitimate company from doing business.

It was said yesterday that we could pass a bill with sufficient exclusions, and if some company were included who should not be included, the law could be amended. In answer to that, may I say that in the meantime irreparable damage might be done before the amendment could be effective. It would be difficult to provide enough exclusions to protect every concern or person that might be affected by this proposed law. (P. 39.)

Mr. Youngdahl concluded as follows (p. 39):

MR. YOUNGDAHL. Everyone is susceptible to misrepresentation and in our weaker moments some of us may become victims. However, there are many very reliable concerns in America performing a real insurance service based on the principle of cooperation and mutual helpfulness. To eliminate these companies by legislation would be depriving the American people of a real service.

I believe the bill before you, if passed, might do more harm than good and would be a dangerous invasion in a field that is now adequately protected.

Following these Hearings, no Bill was reported out by the Committee on Post Office and Post Roads.

In 1955, Congressman Ford of Michigan introduced two Bills, similar to the earlier Hobbs Bills. These were H. R. 2393 and H. R. 6916, 84th Congress, 1st Session. And Senator Cotton of New Hampshire introduced a similar Bill in

the Senate. S. 981, 84th Congress, 1st Session. All of these Bills were referred to Committees. None was reported out.

Similarly, in 1957 Congressman Christopher introduced H. R. 116 and H. R. 7087, and Congressman Rhodes introduced H. R. 5041, 85th Congress, 1st Session, all with similar objectives. All of these Bills were referred to Committees and none was reported out.

In 1959, Congressman Rhodes introduced H. R. 9052, 86th Congress, 1st Session. This, too, was referred to the Committee on Post Office and Post Roads, and was not reported out.

In addition to these Bills, substantial Hearings were held by the Senate Judiciary Committee under the Chairmanship of Senator Langer in 1955. These Hearings were held with the aid of a staff, and were held in various cities in the country. Congress took no action either to subject mail-order insurance to further federal regulation or restriction or to grant to the States any increased authority to tax or to regulate mail-order insurance.

In this situation, it is plain that Congress was well-informed, and that not enough sentiment arose to make it seem desirable to enact legislation which would change the situation as it was then understood to be. This matter is fully discussed in an article by Charles C. McCarter, then Assistant Attorney General of Kansas, entitled "Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising," published in 23 Insurance Counsel J. 82 (1956). Mr. McCarter said that "to pass legislation which requires all companies to act in a given way for the purpose of eliminating the deceptive practices of a few companies is to over legislate. Legitimate company operations are hampered needlessly." 23 Insurance Counsel J. at 100.

II

THE LEGISLATIVE HISTORY OF THE McCARRAN-FERGUSON ACT IS CLEAR, AND HAS BEEN ACCEPTED IN PRACTICAL CONSTRUCTION.

Following this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), Congress did enact the McCarran-Ferguson Act. This was the result of extensive consideration by Congress, beginning in 1944. Hearings were held in 1944, which were published in five parts. The House of Representatives passed H. R. 3270 on June 22, 1944. This bill was never finally passed by the Senate.

In 1945, bills were introduced in both House and the Senate. The Senate passed S. 340 with amendments, and it went on to the House of Representatives, where it was referred to the House Committee on the Judiciary. It was reported to the House on February 13, 1945. House Report No. 143, 79th Congress, 1st Session. This Report contains the following passage at page 3:

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks

within the State or to regulate such transactions in any way.[2]

The Senate bill passed the House with amendments. When this bill came back to the Senate, the Senate asked for a conference. The bill as reported by the conference committee was eventually accepted by both the House and the Senate. In making the conference report to the Senate, Senator McCarran made the following statement at the beginning of his presentation (91 Cong. Rec. 1442):

> Mr. President, let me make one statement which I think should be placed in the RECORD here. It should be stated here, as it was stated in the report which went to the House, from which I read that —
>
> > It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578); *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346); and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77).

The two statements are identical, except that Senator McCarran did not read the last clause of the House Report.

This language, used in both the House and the Senate, is obviously a crucial element in the legislative history of the statute. The language was carefully chosen, and it should be examined in the same way. Moreover, in examining this language, it should be put in its setting, namely the con-

[2] In a previous report, made on February 8, 1945, the House Judiciary Committee reported on H.R. 1973. House Report No. 68, 79th Congress, 1st Session. This Report contains (p. 2) the same language as that in House Report No. 143.

sideration of the McCarran-Ferguson Act which was designed to restore state taxation and regulation of the insurance business to the place it had before this Court's decision in the *Southeastern Underwriters* case. The statement, in both the House and the Senate, is specific that: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that *which they had been held to possess* prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." (Italics added.) In other words, the states were restored (with respect to taxation and regulation) to the position which they held in 1944, but no further powers were granted to them. For this purpose, it is important to observe that at that time no case had held that a non-qualified mail order insurance company was subject to taxation and regulation in any state other than its state of domicile, and the practice was thoroughly established in the states that such non-qualified companies were not subject to taxation and regulation.

This is explicit in the Proceedings of the National Association of Insurance Commissioners, and in the reports of its Committee on Unqualified Insurers. It is explicit in the hearings of the Federal Trade Commission held in 1948 and 1949 preceding the adoption by that Commission of its Trade Practice Rules relating to "advertising and sales promotion of mail order insurance." These were published in the Federal Register for February 3, 1950 — 15 Fed. Reg. 599.

It was explicit in the hearings held by Senator Langer for the Senate Judiciary Committee in 1955, from which no legislation resulted.

Finally, such an understanding and practical construction is the very foundation of this Court's decision in *Federal Trade Commission* v. *Travelers Health Association,* 362

U.S. 293 (1960). The whole question in this case was whether the Federal Trade Commission had power to regulate mail order insurance in view of the McCarran-Ferguson Act. This Court held that the Federal Trade Commission had such power because the states did not have effective power to regulate such insurance. The Court quoted (362 U.S. at 297) from its Opinion in *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564 (1958), where it referred to "interstate insurance practices which the states cannot for constitutional reasons regulate effectively."

It is hard to conceive of a situation where the practical construction of a statute was more clearly established, over a long period of time. It was established through the legislative history in both Houses of Congress. It was established by one of our major federal administrative agencies, the Federal Trade Commission. It was established by the action and understanding of the insurance officials of the states. And, finally, this practical construction was confirmed by this Court in *Federal Trade Commission* v. *Travelers Health Association*, and also in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 45 (1962).

We have become accustomed to changing construction of constitutional provisions, and this is illustrated in many decisions of this Court. Constitutional doctrines grow and develop, ebb and flow. But the question involved in this case is essentially one of statutory construction, namely, what did Congress mean when it passed the McCarran-Ferguson Act in 1945? On such a matter, legislative history and practical construction over a period of many years should be controlling. If there is to be a change in the law, Congress can make it, and Congress is the body which should make it. Congress can well consider all of the competing considerations, and can extend the powers of the states to tax and regulate mail order insurance if it wants to do so. As we have shown, the question has been presented to Congress, on several occasions, and Congress has refrained from any action.

III

THE COMMONLY ACCEPTED LIMIT ON THE POWERS OF THE STATES, ACCEPTED OVER MANY YEARS, AND THE PRACTICAL CONSTRUCTION OF THE McCARRAN-FERGUSON ACT FOR MORE THAN TWENTY YEARS, SHOULD BE CONTROLLING ON THE MEANING OF THE STATUTE.

The practical construction is clear, and long continued. It is found in the action of Congress, in the inaction of Congress, in this Court's decisions in the *Travelers Health Association* and the *Todd Shipyards* cases, and in the common understanding of the insurance industry and the state insurance officials.

The situation is not essentially different from that involved in *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), where this Court said (p. 357):

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

The *Toolson* case was cited and relied on by this Court in *State Board of Insurance* v. *Todd Shipyards,* 370 U.S. 451, 457 (1962), dealing with a very closely analogous question involving the McCarran-Ferguson Act. The Court there said:

> But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the *Allgeyer* decision was announced; and we are advised by an *amicus* brief how severe the impact would be on small insurance companies should the old rule be changed. When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions (see *Federal Trade Comm'n* v. *Travelers Health Assn.,* 362 U.S. 293, 301-302), we should be loath to change them.

The amicus brief to which reference is made in the *Todd Shipyards* opinion was filed on behalf of Church Fire Insurance Corporation (now Church Insurance Company) and Catholic Relief Insurance Company, both of which do business on the same basis as the Appellant here. These are the companies to which this Court specifically referred when it noted "how severe the impact would be on small insurance companies should the rule be changed." 370 U.S. at 457. That impact was deemed to be controlling on the question of statutory construction in 1962 when the *Todd Shipyards* case was decided. That impact will be no less today. It is hard to see how there is any basis for changing the construction which was arrived at in 1962 with specific reference to these "small insurance companies," both of which do business on the same basis as the Appellant.

IV

No decision of this Court, before or after the McCarran-Ferguson Act has sustained regulation or taxation of a mail-order company not qualified in the state.

In the brief filed in this case by the State of California, it is contended that the present case is governed by "Another line of cases" (California Br. 3), and *Osborn* v. *Ozlin,* 310 U.S. 53 (1940), *Hoopeston Canning Co.* v. *Cullen,* 318 U.S. 313 (1943), and *Travellers Health Assn.* v. *Virginia,* 339 U.S. 643 (1950), are cited.

None of these cases is relevant to the present case. The first two involved companies which *had qualified* to do business in the state which sought to regulate them. In other words, the question raised in each case related to the power of the state over a company which had taken affirmative steps to accept the state's jurisdiction. Neither of these two cases involved an *unqualified insurer,* that is, a company which had not accepted the state's jurisdiction.

Osborn v. *Ozlin* involved "foreign corporations authorized to do casualty and surety business in Virginia." 310 U.S. at 60.

Hoopeston Canning Co. v. *Cullen* involved companies which "have been annually licensed to do business in New York since 1930." 318 U.S. at 315. The petition filed in the trial court in that case alleged (R. 8, No. 358, October Term, 1942):

> "That said Canners Exchange Subscribers at Warner Inter-Insurance Bureau ever since their compliance with the aforesaid laws have, and continue so to be, licensed as inter-insurers in said state."

This allegation was admitted in the state's Answer (R. 16, No. 358, October Term, 1942). See also R. 12 and 22, for corresponding allegation and answer in an associated case. That the companies were licensed in New York was emphasized in the opening statement of counsel. R. 39-40. The trial court specifically found that the companies "have been, and now are, licensed as inter-insurers in the State of New York." R. 123-124, 140.

Travellers Health Association v. *Virginia* is a service of process case, and wil be discussed with other cases of this sort in the next Section of this Petition.

Thus it is clear that no decision of this Court, either before or after the McCarran-Ferguson Act, has ever held that a State had power to regulate or to tax a non-resident mail-order insurance company which *had not qualified* to do business in the state. For twenty years after the enactment of the McCarran-Ferguson Act the question did not arise because it was commonly accepted by all concerned that the states had no power to tax or to regulate in such cases. This understanding was confirmed by the underlying bases of this Court's decisions in *Federal Trade Commission* v. *Travellers Health Association*, 362 U.S. 293 (1960), and in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

The distinction is not a merely artificial or verbal one, as the development of the insurance business in this area clearly shows. Moreover, as indicated above, it is a distinction which Congress has clearly recognized, and has repeatedly refrained from changing.

Finally, it is precisely the distinction which this Court made in *Compania General de Tabacos* v. *Collector of Internal Revenue,* 275 U.S. 87 (1927). In that case, two policies of insurance were involved, both entered into, and payable, outside of the Philippine Islands. One of the companies was qualified to do business in the Philippines, and the other was not. This Court held that the Philippine Government could tax the policy issued by the qualified company, and could not tax the policy issued by the company which had not qualified. This decision has entered into the fabric of the law in this area, and is a part of the background, wholly consistent with the explicit statements of Congress in the legislative history of the McCarran-Ferguson Act, which should enter into the construction of that statute.

V

DECISIONS WITH RESPECT TO SERVICE OF PROCESS ARE IRRELEVANT SINCE THE MCCARRAN-FERGUSON ACT BY ITS TERMS REFERS TO "REGULATION" AND "TAXATION" AND FIXES THE POWERS OF THE STATES ON THESE MATTERS AS THEY STOOD IN 1945.

Over the past twenty-one years, and since the enactment of the McCarran-Ferguson Act, there has been considerable development in our law of jurisdiction of courts, and this Court has upheld under the due process clause statutes which have provided for service of process and jurisdiction of courts in situations beyond that of the law as earlier understood. Perhaps the leading one of these cases is *International Shoe Co.* v. *Washington,* 326 U.S. 310, which was decided on December 3, 1945. Two more recent cases

have both involved insurance companies. *Travellers Health Ass'n* v. *Virginia,* 339 U.S. 643 (1950), referred to above, and *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957).

We have no quarrel with any of these cases. They are excellent examples of the growth and development of *constitutional* doctrine, and they may well indicate that the states could expand their powers to tax and to regulate if Congress, in the exercise of its power to regulate commerce, chose to grant such powers to the states. But Congress has clearly indicated its intention not to extend the powers of the states beyond what they were in 1945, as far as taxation and regulation are concerned.

The McCarran-Ferguson Act makes no reference to service of process or to jurisdiction of courts, and thus does not in any way interfere with the development of the law in those areas as far as insurance companies are concerned. But the McCarran-Ferguson Act does deal expressly with "taxation or regulation," *ipsissimis verbis,* and Congress expressly indicated its intention that the grant of power which it made to the states should not "clothe the States with any power to *regulate or tax* the business of insurance *beyond that which they had been held to possess*" (italics added) in 1944 when the *South-eastern Underwriters* case was decided. Thus Congress has imposed a still-stand on taxation and regulation by the states, though it has made no such limitation with respect to service of process and jurisdiction of courts.

Consequently, service of process cases are quite irrelevant as far as the present question is concerned. The law in that area is free to develop as it may. But the allocation of power to the states to tax or to regulate insurance business done by mail is wholly within the control of Congress, and Congress has made it plain that it intends that that power be fixed, and not subject to expansion or change

except as Congress chooses. Congress has made no change, and that should be controlling here.

That this has not been wholly inadvertent on the part of Congress is illustrated by the materials given above in Point I, and also by reference to the Act of September 14, 1959, Pub. L. 86-272, 73 Stat. 555 (U.S.C., Title 15, secs. 381-384; the text of sec. 381 is set out in the Appendix). By this statute Congress has shown its concern that interstate business, without an establishment in the state, conducted by the "soliciation of orders . . . which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State," should not be subject to local state taxation. This clearly refers to mail-order business, with the addition of local solicitation. *Cf. National Bellas Hess, Inc.* v. *Department of Revenue*, No. 241, October Term, 1966, in which Probable Jurisdiction has been noted. This whole question has been the subject of extensive investigation by Committees of Congress, pursuant to the express mandate of Congress. This statute clearly evidences the understanding and temper of Congress. If mail-order sales of tangible personal property are not to be subject to local taxation, it is hard to believe that Congress contemplates that mail-order insurance operations should be so taxed, particularly when Congress has been explicit in saying that the states should not have such a power unless "they had been held to possess" this power in 1944 — which clearly they never had.

VI

MAIL-ORDER COMPANIES ARE SUBJECT TO SUBSTANTIAL AND ADEQUATE REGULATION.

There may be concern that mail-order insurance will be the subject of abuse, and that it will be "above the law" unless it is subject to state regulation. But this is clearly not the case.

Mail-order insurance is, in fact, subject to many, and effective, controls:

1. *Fraud orders by the Post Office Department.* If a mail-order insurance business is conducted in a fraudulent manner, it can be readily controlled by having its access to the mails stopped through a Post Office fraud order. This can be a very effective remedy, and it can be put into effect by administrative action. In some cases, the Post Office issues "stop" orders, under which mail is held, pending the determination whether a fraud order should be issued. See McCarter, "Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising," 23 Insurance Counsel J. 82, 97 (1956).

2. *Using the mails to defraud.* Where the mails have been used in a fraudulent way, the Department of Justice can initiate criminal prosecutions under sec. 1341 of Title 18 of the United States Code. Such prosecutions have been carried out. See e.g., *United States* v. *Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), certiorari denied, 342 U.S. 943 (1951); *United States* v. *Minnec*, 104 F.2d 575 (7th Cir. 1939); *United States* v. *Littlejohn*, 96 F.2d 368 (7th Cir. 1938), certiorari denied, 304 U.S. 583 (1938). It is well-known that the power to prosecute for "mail fraud" is a powerful and effective remedy. This is, of course, peculiarly applicable to the mail-order insurance business, if this should be conducted in a fraudulent manner.

3. *Federal Trade Commission.* The Federal Trade Commission has broad power with respect to practices of persons engaged in interstate commerce, and it has expressly used those powers with respect to mail order insurance.

In May, 1949, public hearings were held in Washington by the Federal Trade Commission with respect to mail-order insurance. See Donovan, "Regulation of Insurance

under the McCarran Act," 15 Law and Contemporary Problems 473 (1950).

On February 3, 1950, the Federal Trade Commission promulgated trade practice rules relating to "Advertising and Sales Promotion of Mail order Insurance." These are Part 187 of Chapter 1 of Title 16 of the Code of Federal Regulations, and they were published in the Federal Register for February 3, 1950. 15 Fed. Reg. 599. In 1964 these were supplemented by "Guides for the Mail Order Insurance Industry," promulgated by the Federal Trade Commission on April 28, 1964, and effective on July 14, 1964. 29 Fed. Reg. 6381. See Hanson and Obenberger, "Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business," 50 Marquette L. Rev. 175, 209 (1966).

These rules may be enforced through cease and desist orders by the Commission. It was these rules which this Court held the Commission had the power to promulgate in *Federal Trade Commission* v. *Travelers Health Association,* 362 U.S. 293 (1960), on the ground that this power was retained by Federal authority under the McCarran-Ferguson Act, because "the States cannot for constitutional reasons regulate effectively" this element of the insurance business. 362 U.S. at 297, quoting from *Federal Trade Commission* v. *National Casualty Co.,* 357 U.S. 560, 564 (1958).

4. *State action.* One of the chief complaints against mail-order insurers has been that the insured had to go far away in the event of suit, and could only sue the company in its own home forum. That, of course, has been completely changed. Where the insured was living in the state when the policy was issued and he paid the premium by mail, he can sue the insurance company in his own state, if the state has passed a statute authorizing such a suit. *McGee* v. *In-*

ternational Life Insurance Co., 355 U.S. 220 (1957). Most states have passed such statutes, and Wisconsin has done so. Thus there is no problem about an insured in Wisconsin getting jurisdiction over the Appellant for a suit in the Wisconsin courts. Actually the present Appellant has not been a party to a suit in any state for many years (R.200), but it readily accepts the jurisdiction of the Wisconsin courts, and has expressly refrained from raising any question about this portion of the Wisconsin statute in the present case.

Moreover, the Appellant (and other mail-order insurance companies) are subject to effective state regulation. The Appellant is subject to regulation in Minnesota, where it regularly files reports and is subject to examination, and to the regulatory authority of the Minnesota Insurance Department.[3] The Appellant is not a fly-by-night operation. It has been domiciled in Minnesota for many years, and has faithfully met its obligations to policy-holders not only in Minnesota, but in other States and provinces, including Wisconsin. As far as the present Appellant is concerned, no question is raised in this case about preventing abuses. There have been none. If there is a problem about possible abuses in other cases, that could readily be taken care of by cooperation between the insurance departments of the several states. State regulation of mail-order insurance, through the state of domicile, is now effective, and can be made more effective, if that is needed.

Thus, it appears that the mail-order insurance business is now subject to extensive regulation, both state and federal. If there is need for greater state regulation, Congress should make the determination, through an exercise of its power to grant to the states a greater authority to regulate this segment of interstate commerce.

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[3] See Laws of Minnesota, Secs. 72.20-72.23.

VII

THE EFFECT OF SUSTAINING THE STATUTE IS TO MAKE IT DIFFICULT FOR SMALL AND SPECIALIZED COMPANIES TO COMPETE, AND THUS TO ACCENTUATE THE PROCESS BY WHICH BUSINESS ACTIVITY IN THIS COUNTRY IS TRANSFERRED FROM MANY SMALL COMPANIES TO A RELATIVELY FEW BIG ONES.

The companies concerned in this case are mostly small ones, doing specialized — and useful — business. These include Church Insurance Co., Catholic Relief Insurance Co., and the Appellant, Ministers Life and Casualty Union, which writes insurance for paid religious workers only. There is no need for the participation of agents in this process, and their intervention only needlessly increases the cost of providing insurance.

This method of doing business is similar to that of Savings Bank Life Insurance which was developed in Massachusetts under the leadership and urging of Louis B. Brandeis. Although this insurance is sold "over the counter" rather than by mail, one of the basic objectives was to hold down costs by eliminating the necessity of agents and thus saving for the insured the amount normally paid for the agent's commission. Savings Bank Life Insurance has now extended into New York and Connecticut, where it is sold by banks at reduced sales cost.

If mail-order insurance is made subject to taxation and regulation in states where the insurer has not qualified to do business, the costs of doing business will necessarily be increased, through the taxes payable, and through the costs of regulation, including the expenses of agents' commissions, under co-called "resident agents" laws which have been adopted by many of the states. The result will be that the small specialized company, such as the Appellant here, will find it difficult to compete with the large companies, which have vast resources, and extensive sales organizations. A large company can spread over millions of policies the costs of the record-keeping and paper work required in

making separate reports to all of the states in which it does business. Its volume is such that it can effectively realize the savings available to large-scale operations through modern computers and record-keeping and communications devices.

The smaller company, though offering a useful special service, cannot achieve the savings which come from operations in large volume. The cost of multiple compliance can become very burdensome to it, with the result that it is not able to provide as economical a service to its customers. In the course of time, there may remain little reason for its existence, and it may well be wise for its business to be absorbed into a larger company through reinsurance, merger, or otherwise. In this way, small business is swallowed up by big business, and smaller businesses tend to disappear from the scene. Perhaps these companies have led a sheltered life, but it has been a shelter which Congress has known, and has consistently refused to change. Is this not the sort of essential political judgment which should be left as Congress has chosen to make it?

What is the relevance of these considerations to this Court's role in this case? Certainly the policy of the country is well established, through many pieces of legislation (Sherman Act, Clayton Act, Small Business Administration, provisions of the Internal Revenue Code favoring small businesses, and Small Business Investment Corporations) in favor of encouraging small businesses, and looking with disfavor on legal pressures which tend to force small businesses into big ones. It is doubtful, therefore, that without some statutory warrant this Court should reach a decision which is, in its effect, contrary to this policy.

But the policy is even more relevant here, because the Court is here, in sum and substance, construing an Act of Congress — the McCarran-Ferguson Act — which has in the past uniformly been understood to protect the mail-

order insurance company, and in a situation where Congress has over a long period of years failed to change the statute or to allow the small companies to be taxed or regulated by the states, and this inaction by Congress has at least twice been confirmed by this Court. *Federal Trade Commission* v. *Travelers Health Association*, 362. U.S. 293 (1960); *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962).

May it not be that the reason Congress has consistently refrained from granting to the States the power to regulate and tax these mail-order companies, and specialized companies generally, which can effectively conduct their operations by mail, without the intervention of agents, is its desire not to interfere with the operation of these companies — though it has been repeatedly requested to do so? Is this not a relevant factor in determining the proper construction of the statute now before the Court? Should this Court in effect amend without a hearing the statutory arrangements set up and long accepted by Congress?

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for a Rehearing should be granted, and that probable jurisdiction should be noted in this case, and the case set down for oral argument.

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December, 1966

I certify that this Petition for Rehearing is presented in good faith and not for delay.

ERWIN N. GRISWOLD
Counsel for Appellant

APPENDIX

Act of September 14, 1959, P.L. 86-272, 75 Stat. 555-556 (United States Code, Title 15, sec. 381)

AN ACT

Relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I — IMPOSITION OF MINIMUM STANDARD

SEC. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to —

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section — —

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

[Section 201 and Title II are omitted.]

CERTIFICATE OF SERVICE

I, Erwin N. Griswold, attorney for the Ministers Life and Casualty Union, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of December, 1966, I served copies of the foregoing Petition for a Rehearing, pursuant to Rule 33 of the Rules of the Supreme Court, by causing copies thereof to be deposited in a United States Post Office or mail box with air mail postage prepaid, addressed to counsel of record for the appellees at Room 114 East, State Capitol, Madison, Wisconsin 53702.

ERWIN N. GRISWOLD,
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